

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

EDWARD FINLEY,

Plaintiff,

vs.

HOWARD SKOLNIK, et al.,

Defendants.

Case No. 2:10-CV-01782-JCM-(VCF)

ORDER

Presently before the court is defendants' motion to dismiss. (Doc. # 12). Pro se plaintiff Edward Finley filed a response in opposition (doc. # 17), and defendants filed a reply (doc. # 18).

Also before the court is defendants' motion to stay discovery, or alternatively, motion for enlargement of time. (Doc. # 28). No response or reply has been filed.

Also before the court is defendants' motion to amend/correct a previously filed notice. (Doc. # 31). No response or reply has been filed.

I. Background

Plaintiff is an inmate in state custody. Plaintiff initiated this civil action by filing a complaint entitled "civil tort claim" in state court. (See doc. # 1). The complaint named all of the following prison official state defendants: Howard Skolnik, Greg Cox, Brian Williams, Cheryl Burson, Clarence King, Lavert Taylor, William Tate, and Tanya Hill.

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1 The defendants timely removed the action to this court pursuant to 28 U.S.C. §§ 1441 and 1443.
2 (Doc. # 1). This court issued its screening order of the complaint. (Doc. # 11). The court recognized
3 the following claim:

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5 Plaintiff alleges that he is Jewish. He claims that prison officials have denied
6 his requests to be provided kosher meals; they required that he provide
7 recognition from an outside Jewish organization that he actually is a
8 conservative or orthodox Jew. Plaintiff also claims that prison officials then
9 retaliated against him when he complained about the denial. Plaintiff's
allegations, if true, state claims of violations of the Constitution of the United
States and of the Religious Land Use and Institutionalized Persons Act, 42
U.S.C. § 2000cc et seq.

10 (Doc. # 11). In the screening order the court ordered defendants to serve an answer or other response.
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12 After the screening order, defendants filed the instant motion to dismiss. Defendants argue that
13 plaintiff's complaint should be dismissed because he failed to exhaust administrative remedies at the
14 prison before filing the complaint. (Doc. # 12).

15 **II. Legal Standard**

16 "The failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a
17 matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for
18 summary judgment." *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). "[D]ismissal of an action
19 on the ground of failure to exhaust administrative remedies is not on the merits." *Id.* (quoting *Health*
20 *v. Cleary*, 708 F.2d 1376, 1380 n. 4 (9th Cir. 1983). Therefore, the dismissal is better suited at the
21 motion to dismiss stage as opposed to the summary judgment stage because "summary judgment is on
22 the merits." *Id.* (quoting *Stauffer Chem. Co. v. FDA*, 670 F.2d 106, 108 (9th Cir. 1982).

23 "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may
24 look beyond the pleadings and decide the disputed issues of fact." *Id.* at 1119-20. "If the district court
25 concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of
26 the claim without prejudice." *Id.* at 1119-20.

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1 Prisoners seeking relief under § 1983 must exhaust all available administrative remedies prior
2 to bringing suit. *See* 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison
3 conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison,
4 or other correctional facility until such administrative remedies as are available are exhausted..”); *Jones*
5 *v. Bock*, 549 U.S. 199, 212 (2007) (“There is no question that exhaustion is mandatory under the PLRA
6 and that unexhausted claims cannot be brought in court.”). Finally, exhaustion must predate the filing
7 of the lawsuit—a prisoner cannot properly exhaust under § 1997e(a) if the exhaustion of administrative
8 remedies occurs while the lawsuit is pending. *See McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.
9 2002).

10 **III. Discussion**

11 Plaintiff’s complaint states that each of the pled counts in the complaint occurred from April 19,
12 2010, to the present. Plaintiff further alleges that he exhausted administrative remedies by way of
13 grievance number 2006-289-6803.

14 Defendants have produced the operative grievance with their motion. (*See* doc. # 12, exs. A-C).
15 Defendants argue that the operative grievance does not make the same claims as those that survived this
16 court’s screening order. Defendants argue that plaintiff did not submit any grievances pertaining to
17 claims recognized in the screening before plaintiff filed his complaint.

18 The court has reviewed the attached grievance, filled out by plaintiff, and the declarations of the
19 prison officials involved. In plaintiff’s grievance, he does not make the same claims as those that
20 survived the screening in this lawsuit.

21 In his response to the motion to dismiss, plaintiff lists several grievances that may or may not
22 have made the same claims that are alleged in this lawsuit. Defendants correctly point out that all the
23 grievances listed in plaintiff’s response were filed after the initiation of this lawsuit. Therefore, those
24 grievances cannot save the complaint from dismissal without prejudice.

25 Additionally, defendants have filed a motion to stay discovery pending the motion to dismiss.
26 The court’s finding that the complaint should be dismissed without prejudice moots the motion to stay
27 discovery. The dismissal of the complaint further moots the motion to amend/correct the notice filed
28 by defendants (doc. # 31).

1 Accordingly,

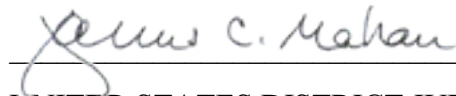
2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion to dismiss
3 (doc. # 12) be, and the same hereby, is GRANTED.

4 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff's complaint shall
5 be dismissed without prejudice. The clerk of the court shall enter judgment and close the case.

6 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendants' motion to stay
7 discovery, or alternatively, motion for enlargement of time (doc. # 28) be, and the same hereby, is
8 DENIED as moot.

9 IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED that defendants' motion to
10 amend/correct the motion to strike (doc. # 31) be, and the same hereby, is DENIED as moot.

11 DATED March 27, 2013.

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15 UNITED STATES DISTRICT JUDGE
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